NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 08-1235

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 09, 2009
LEONARD GREEN, Clerk

NADA SAAB, Ph.D., Plaintiff-Appellant, v. JIMMY WOMACK, Reverend, M.D., President, Detroit Board Member; JOYCE V. HAYES-GILES, Esquire, Vice President, Detroit Board Member, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

O R D E R

Before: MARTIN and GILMAN, Circuit Judges; ZOUHARY, District Judge.*

Nada Saab appeals, pro se, the summary judgment for defendants in an employment discrimination action filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and state law. Saab has filed a motion for counsel. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. FED. R. APP. P. 34(a).

Nada Saab filed a complaint against 17 named defendants and 33 unidentified "John Doe" defendants. The named defendants are various members of the Detroit Board of Education and other individuals that Saab worked under during the course of her employment as a Limited License Instructor ("LLI"), and later as a probationary contract teacher with the Detroit Public Schools ("DPS"). Saab alleges that she was subjected to discrimination, a hostile work environment, and

*The Honorable Jack Zouhary, United States District Judge for the Northern District of Ohio, sitting by designation.

retaliation during her employment with the DPS. She also alleges both procedural and substantive due process violations, as well as state law claims for gross negligence and breach of a collective bargaining agreement ("CBA"). The defendants moved for summary judgment, and Saab filed a response. The district court granted judgment for defendants. This appeal followed.

We review the district court's grant of summary judgment de novo under the standard set forth under Fed. R. Civ. P. 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 301 (6th Cir. 2005). Summary judgment is granted when the movant demonstrates that the pleadings, depositions, affidavits, and other evidence available to the court establish no genuine issue of material fact, and that the movant is entitled to a judgment as a matter of law. *See* Fed. R. Civ. P. 56(c).

Saab has an initial burden of establishing a prima facie case of discrimination by showing that she: (1) is a member of a protected class; (2) was subjected to an adverse employment action; (3) was qualified for the position; and (4) was replaced by a person outside of the protected class. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under a disparate-treatment claim, a prima facie case includes a showing that a similarly situated non-protected employee received better treatment for the same or similar conduct. *See Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582-83 (6th Cir. 1992). In a retaliation case, Saab must show that: (1) she engaged in protected activity; (2) the activity was known to defendant; (3) defendant then took adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 792 (6th Cir. 2000); *Canitia v. Yellow Freight Sys.*, 903 F.2d 1064, 1066 (6th Cir. 1990). In order to establish a hostile work environment claim, Saab must show the following: (1) the employee is a member of a protected class; (2) the employee was subject to unwelcomed retaliatory harassment; (3) the harassment was based on the employee's protected activity; (4) the harassment created a hostile work environment; and (5) the employer failed to take reasonable care to prevent and correct any harassing behavior. *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 560-61 (6th Cir. 1999).

Upon review, we conclude that the defendants were entitled to summary judgment on Saab's discrimination claims. The elements of the prima facie case at issue are whether Saab suffered an adverse employment decision and whether a comparable non-protected person was treated better. *See Mitchell*, 964 F.2d at 582-83. An adverse employment action is a "materially adverse change in the terms and conditions of [the plaintiff's] employment." *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 461 (6th Cir. 2000) (quoting *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999)). "A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Hollins*, 188 F.3d at 662.

Saab's alleged "adverse actions" are: (1) a variety of relatively minor complaints about her supervisors that do not relate to any tangible employment actions having been taken against her (*e.g.*, her supervisor lacked certification for a period of time, her supervisor did not give her timely comments after observing her in the classroom, her supervisor was late in assigning her a mentor, etc.); (2) statements about actions taken by Saab or inaction of third parties (*e.g.*, Saab, through her union, filed a grievance); and (3) questions about potential future actions (*e.g.*, what kind of employment reference will be given by the defendants in the future). None of these acts, however, were adverse employment actions as defined by this circuit.

Nor does DPS's failure to provide Saab with a written statement of whether her work has been satisfactory constitute an "adverse action" for purposes of establishing a Title VII claim. Even if the DPS failed to give Saab a required written statement regarding whether or not her work was satisfactory under Mich. Comp. Laws § 38.83, that failure would actually have a positive impact on Saab's employment status because such failure would be considered conclusive evidence that Saab's work was satisfactory.

Summary judgment for the defendants was proper to the extent Saab alleged that she was subjected to a hostile work environment. The conduct alleged by Saab does not constitute harassment that is severe or pervasive enough to support a hostile work environment claim.

Moreover, Saab has not presented any evidence to establish that the alleged actions by the defendants were based on her membership in the protected class, *i.e.*, Saab's nationality.

Summary judgment for the defendants was proper to the extent that Saab alleged retaliation. Saab's retaliation claim fails because she did not pursue a retaliation claim before the Equal Employment Opportunity Commission. *See Cox v. City of Memphis*, 230 F.3d 199, 201-02 (6th Cir. 2000).

Summary judgment for the defendants was proper to the extent that Saab alleges both procedural and substantive due process violations. "Due process is . . . triggered by some deprivation of life, liberty or property." *See Eggers v. Moore*, 257 F. App'x 993, 995 (6th Cir. 2007). Here, Saab alleges that she was improperly observed while she was employed by the DPS. Saab has not alleged, however, that she suffered any deprivation of life, liberty or property because she was not terminated or disciplined during her employment. *Id.*

Nor can Saab maintain a substantive due process claim. Even if Saab had established the deprivation of a contractual right, "[t]he substantive Due Process Clause is not concerned with the garden variety issues of common law contract"; that is, because Saab's contractual interest, if any, in her employment may be "redressed adequately in a state breach of contract action, [it] is simply not a proper subject of federal protection under the doctrine of substantive due process." *Bowers v. City of Flint*, 325 F.3d 758, 763-64 (6th Cir. 2003) (internal quotation marks and citation omitted).

Summary judgment for the defendants was proper to the extent that Saab alleges a gross negligence claim under state law. The board-member defendants have absolute immunity pursuant to Mich. Comp. Laws Ann. § 691.1407(5). *See Nalepa v. Plymouth-Canton Comm. Sch. Dist.*, 525 N.W.2d 897, 901 (Mich. Ct. App. 1994). Michigan law further extends immunity to the individual defendant employees of the city to the extent that the employees acted within the scope of their authority, were engaged in the exercise or discharge of a governmental function, and their conduct did not amount to gross negligence. Mich. Comp. Laws Ann. § 691.1407(2)(a)-(c). Gross negligence is defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws Ann. § 691.1407(2)(c). Saab's complaint does not

allege that the remaining defendants were acting outside of the scope of their authority, and there can be no dispute that the governmental agency, *i.e.*, the school board, was engaged in the exercise or discharge of a governmental function in employing, supervising and evaluating Saab as a teacher. In addition, the alleged conduct of the remaining defendants, even if established to be true, would not constitute "gross negligence" under the statute.

Finally, summary judgment for the defendants was proper to the extent that Saab alleges a breach of the CBA. The CBA requires exhaustion of administrative remedies. It is undisputed that Saab failed to exhaust her administrative remedies.

Accordingly, the motion for counsel is denied, and the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk